



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 22, 2015

Ms. Sarah Parker
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2015-26990

Dear Ms. Parker:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 591577.

The Texas Department of Transportation (the "department") received five requests from four requestors pertaining to RFO 601440000001595. The department states it has released some information. The department claims Exhibit B is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. Although the department takes no position as to whether Exhibit C is excepted under the Act, the department informs us release of this information may implicate the proprietary interests of Accela Inc.; DelaSoft Inc. ("DelaSoft"); Eccentex Corporation; BEM Systems Inc.; Vertiba Inc.; Flairsoft, LTD ("Flairsoft"); Global Relief Technologies Inc. ("GRT"); and Pravice LLC. Accordingly, the department states, and provides documentation showing, it notified these third parties of the request for information and of their right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from DelaSoft,

Flairsoft, and GRT. We have considered the submitted arguments and reviewed the submitted information, a portion of which consists of a representative sample.¹

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have only received comments from DelaSoft, Flairsoft, and GRT explaining why the submitted information should not be released. Therefore, we have no basis to conclude any of the remaining third parties has a protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case information is trade secret), 542 at 3. Accordingly, the department may not withhold the submitted information on the basis of any proprietary interest any of the remaining third parties may have in the information.

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The department represents Exhibit B pertains to a competitive bidding situation. In addition, the department states disclosure of Exhibit B would allow third-party competitors to tailor their proposal and bids and undermine competition among competitors. After review of the information at issue and consideration of the arguments, we find the department has established the release of Exhibit B would give advantage to a competitor or bidder.

Further, DelaSoft and Flairsoft state they have competitors. DelaSoft states release of some of its information would reveal its "size, profitability[,] and other competitively important business information" and competitors "would be able to use [the] information to their advantage in designing their systems without the investment, trial and error and time expended by [DelaSoft.]" Flairsoft states release of some of its information would allow competitors to target its customers and copy Flairsoft's "signature look" and "features of [Flairsoft's] solution that have not been publicly disclosed." After review of the information at issue and consideration of the arguments, we find DelaSoft and Flairsoft have established the release of the information at issue would give advantage to a competitor or bidder. Thus,

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

we conclude the department may withhold the information we have marked under section 552.104(a) of the Government Code.²

Section 552.110(b) of the Government Code protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5-6.

GRT claims some of its information constitutes commercial or financial information that, if released, would cause it substantial competitive harm. Upon review, we find GRT has failed to demonstrate the release of the information at issue would result in substantial harm to its competitive position. *See* ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Consequently, the department may not withhold any of GRT’s information under section 552.110(b) of the Government Code.

Section 552.136 of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. *See* Open Records Decision No. 684 at 9 (2009). Upon review, the department must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code.

In summary, the department may withhold the information we have marked under section 552.104(a) of the Government Code. The department must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

²As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Rahat Huq
Assistant Attorney General
Open Records Division

RSH/som

Ref: ID# 591577

Enc. Submitted documents

c: 4 Requestors
(w/o enclosures)

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